an exception to the hearsay rule, in homicide cases is justified by the sheer necessity of the case. In addition to the guaranty of trustworthiness arising from the sense of the impending death, the victim in a homicide case is describing a recent occurrence and not attempting to relate the facts of the transaction which may have occurred years previous.

There seems to be no necessity for extending this exception to the hearsay rule to civil cases since the declarant has an opportunity in his lifetime to reduce the transaction to writing or to provide other competent evidence. A mere lack of evidence in civil cases seems hardly weighty enough to justify an additional exception to the hearsay rule

EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST DEVISEE.—The devisee of specific realty mortgaged the land. The administrator attempted to setoff against the devisee's interest in the land a judgment obtained subsequent to the mortgage against the devisee for a debt due the estate at the testator's death. *Held,* the administrator has priority over the mortgagees to the extent of his judgment, and the set-off is allowed. *Senneff* v. *Brackey* (Iowa), 146 N. W. 24.

An administrator can set off against a legatee's interest in the personalty a debt due the estate by the legatee, and thus prevent a circuity of action resulting from the mutuality of demand. *Smith* v. *Kearney,* 2 Barb. Ch. (N. Y.) 533. But realty ordinarily passes directly to the heir or devisee, not subject to any control by the executor or administrator. Title vests immediately upon the death of the ancestor without the necessity of any demand by the heir or devisee. 2 WOERNER, LAW OF ADMINISTRATION, 438.

The distributive share of the real estate of an heir debtor to the estate of his ancestor is not chargeable with such indebtedness, either as land, or as the proceeds thereof in the hands of the administrator. *Marvin* v. *Bowlby,* 142 Mich. 245, 105 N. W. 751, 113 Am. St. Rep. 574, 4 L. R. A. (N. S.) 189; *Smith* v. *Kearney, supra.*

But not as strong an argument can be adduced in favor of the administrator's right to priority in case of a devisee as in case of a distributee. There are no funds in the administrator's hands against which a set-off can be made. He would have to become an actor before he could obtain a lien on the land. *LaFoy* v. *LaFoy,* 43 N. J. Eq. 206, 10 Atl. 266, 3 Am. St. Rep. 312. Set-off of a debt due an estate cannot be made against a specific devise of realty, but it is a race between the administrator and the creditors of the devisee as to priority. *Mann* v. *Mann,* 12 Heisk. (Tenn.) 245. An unrestricted and absolute devise comes to the devisee free from any lien for debts due by him to the estate. *Dearborn* v. *Preston,* 7 Allen (Mass.) 192.

Certainly the rights of a third party, a mortgagee of the property, cannot be affected by an unrecorded lien. To allow this would be to nullify the effect of the modern statutes of registry.

EXECUTORS AND ADMINISTRATORS—PROBATE OF WILL—ATTORNEY'S FEES.—A person named executor in a purported will offered such instrument for

probate when objections thereto were filed. The named executor, believing the will to be valid, engaged counsel to secure its probate. The result of the proceedings was to declare the will invalid. An action was brought by the said counsel against the estate for his attorney's fees. *Held,* the estate is not liable. *Doan* v. *Herod* (Ind.), 104 N. E. 385.

The decisions involving the question in the principal case are in utter confusion, and no satisfactory rule of law can be deduced from their inspection. It would seem, however, that the decisions depend upon the facts in the individual cases, and that three main circumstances are to be looked to in reaching a correct conclusion.

The first of these is the ascertainment of the legal rights and duties of the executor, and since these depend upon the question as to whether he has qualified or not, it is necessary to determine whether the contest over the validity of the will occurred at the time it was offered for probate or whether it occurred after the will had been properly probated and the executor had duly qualified. The second circumstance to be taken into consideration is the success or failure of the contest over the validity of the will—whether the will has been upheld or defeated. The third is as to whether the executor and attorney acted in good faith. The decisions are unanimous in holding that good faith must exist before recovery can be had under any circumstances.

Since the courts draw no distinction between those cases in which the attorney sues the estate for his fees, and those in which the executor sues, the authorities below are used indiscriminately in this respect.

The decisions in the principal case is to the effect that where (1) probate of the alleged will has never been granted, and (2) the result of the contest is that the will is declared to be invalid, then the estate is not liable for the expenses incurred by the executor in defending the will, nor can he bind the estate to pay for such expenses. This decision is based on the ground that the executor has no legal authority to bind the estate before he qualifies, and that in defending the will he acts as agent and for the benefit of those interested in sustaining the will, to whom he must look for payment of expenses. In accord with this view are: *Yerke's Appeal,* 99 Pa. St. 401; *Dodd* v. *Anderson,* 197 N. Y. 466, 90 N. E. 1137, 27 L. R. A. (N. S.) 336, 18 Ann. Cas. 738; *In re Hite's Estate,* 155 Cal. 448, 101 Pac. 448; *Pleasants* v. *McKenney,* 109 Md. 277, 71 Atl. 955. *Contra. Phillips* v. *Phillips,* 81 Ky. 328; *Hazard* v. *Engs,* 14 R. I. 5. As a ground for the *contra* view it has been suggested that the appointment of an executor in a will is an implied direction and authority to propound the will for probate, and that with the implied direction is the correlative implied promise that the executor shall be reimbursed out of the estate for all reasonable and necessary expenses incurred.

Where the will has been probated and the executor has qualified, and afterwards objections are filed to the validity of the will, it is held by the great weight of authority that the executor can recover for expenses incurred in defending the will even though the will be declared invalid. Here it is the executor's legal duty to defend. *Lassiter* v. *Travis,* 98 Tenn. 330, 39 S. W. 226 (here executor was the only person to be benefited by setting up the will); *Tilghman* v. *France,* 99 Md. 611,

59 Atl. 277; *In re Waldron's Will,* 74 Misc. Rep. 310, 133 N. Y. Supp. 1104; *In re Title Guaranty & Trust Co.,* 114 App. Div. 778, 188 N. Y. 542, 100 N. Y. Supp. 243, 80 N. E. 1121 (where only one provision of the will held invalid). *Contra. Executors of Andrews* v. *His Administrators,* 7 Ohio St. 143; *Kelly* v. *Davis,* 37 Miss. 76; *In re Fry's Estate,* 96 Mo. App. 208, 70 S. W. 172 (here executor successfully defended the will against an attack by one of the legatees).

It is held that even though the executor has not qualified, if the validity of the will is upheld in a contest, then attorney's fees are payable out of the estate, on the ground that the estate is benefitted by the contest. *Fillinger* v. *Conley,* 163 Ind. 584, 72 N. E. 597; *In re Hentge's Estate,* 124 N. W. 929, 26 L. R. A. (N. S.) 757.

It has been held that good faith on the part of the executor is the controlling element, irrespective of his qualification or the outcome of the controversy. If he have reasonable grounds to believe the will is invalid, then the contest is at his peril. *Henderson* v. *Simmons,* 33 Ala. 291, 70 Am. Dec. 590.

FALSE IMPRISONMENT—JUSTICE OF THE PEACE—LIABILITY FOR OFFICIAL ACTS.—Defendant, a justice of the peace, acted in excess of his jurisdiction in fining and imprisoning plaintiff for contempt and was sued to recover damages for the false imprisonment. *Held,* no action will lie. *Flint* v. *Lonsdale* (Okla.), 139 Pac. 268.

Such as are by law made judges of another shall not be criminally accused or made liable in a civil action for what they do as judges. *Floyd* v. *Barker,* 12 Coke 23. No action lies against a judge for erroneous acts when he has jurisdiction. *Gwinne* v. *Poole,* 2 Lutw. 1560. Judges of courts of superior and general jurisdiction are not liable in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly. *Bradley* v. *Fisher,* 13 Wall. (U. S.) 335. A justice is not liable for enforcing a void city ordinance. *Henke* v. *McCord,* 55 Iowa 378, 7 N. W. 623. Nor is one who in the exercise of his honest judgment passes on the constitutionality of an ordinance. *Brooks* v. *Mangan,* 86 Mich. 576, 49 N. W. 633. And a justice is not liable for causing the arrest of one who failed to obey a subpœna even though the subpœna was defective. *Allec* v. *Reece,* 39 Fed. 341. A justice acting in good faith and having jurisdiction of the parties and subject matter is not liable for acts in excess of that jurisdiction. *Austin* v. *Vrooman,* 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138. Only a colorable jurisdiction need be shown. *Grove* v. *Van Duyn,* 44 N. J. L. 654, 43 Am. Rep. 412. *Broom* v. *Douglass,* 175 Ala. 258, 57 So. 860, 44 L. R. A. (N. S.) 164. No judicial person is liable for acts within his jurisdiction the only distinction between judges of superior and inferior jurisdiction being that in the case of the latter jurisdiction must be made to appear. *Lund* v. *Hennessey,* 67 Ill. App. 233.

It would seem that the tendency of modern authorities is to place judges of courts of inferior jurisdiction on a plane with judges of courts of record as regards responsibility for official acts. The decision in the principal case is supported by the weight of authority.